

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
PETITION FOR  
REHEARING  
EN BANC**



77-1015

In The  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1015

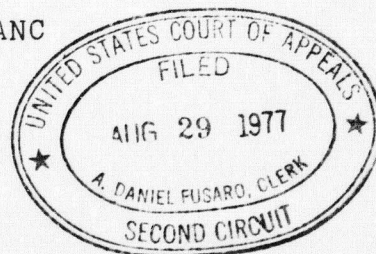
UNITED STATES OF AMERICA,  
APPELLEE,

-VS-

WILLIAM EUGENE ROBINSON,  
APPELLANT.

On Appeal From The United States District Court  
For The District of Connecticut

PETITION FOR REHEARING  
AND SUGGESTION FOR REHEARING EN BANC



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UNITED STATES OF AMERICA,  
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P E T I T I O N

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The appellant, William Eugene Robinson, petitions for a rehearing of his appeal and alternatively suggests rehearing en banc on the ground that the panel overlooked or misapprehended an important and recurring issue in the administration of criminal justice, that is, the denial of appellant's Sixth Amendment Right of Confrontation by the admission of extrajudicial statements in the form of unreliable public records which were devastating to the defense, and where the government neither produced the declarant nor showed that the declarant was unavailable. The panel rendered its decision orally from the bench.

The confrontation issue was raised in appellant's brief and then at oral argument in light of this Circuit's recent decision in United States v. Paul Oates, slip op. 6389 (June 3, 1977), and cases cited therein including Mancusi v. Stubbs, 400 U.S. 204 (1972), and Barber v. Page, 390 U.S. 719 (1968).

The confrontation issue is a result of the government's offer of Connecticut State Labor Department records, to rebut the testimony of Joseph Burroughs, who was Robinson's crucial alibi witness. Burroughs had testified that Robinson was with him in Bridgeport on the day of the robbery, rather than in Shelton where the bank was robbed. Burroughs was able to recall the date, February 18, 1975, because he had gone to the Labor Department in Bridgeport on that date to pick up his unemployment check. The government offered the records including a ledger (Government Exhibit 22H) to rebut and discredit Burroughs' testimony; the records did not contain any entry on February 18, 1975. Therefore, the government was attempting to prove the nonoccurrence of Burroughs' February 18th trip and receipt of the check by showing the absence of an entry in the ledger for that date. However, the records were incomplete. Although the ledger showed that Burroughs had picked up a check on February 10 for the two-week period ending February 8, the actual check and UC/46 claim form were missing. Since even according to the government's own witness, Burroughs was eligible to receive



a check on the 18th as he had testified, and since he could have also picked up the February 8 check on the 18th rather than the 10th, the cancelled check would have been the most reliable record along with the claim form to prove when Burroughs received the check.<sup>1/</sup>

The government's witness, William Kegler, was a state employee whose office was in Wethersfield. He had no first-hand knowledge of what was happening in Bridgeport in February, 1975. He described the unemployment situation as follows:

... since this was at the height [sic] of our recession in Connecticut, our Department was somewhat confused in record keeping, beyond payments made to individuals. In other words, we were paying, let's say thousands of checks per day, over and above what our equipment and staff would allow, and complete processing. Consequently well, I suppose figureatively speaking, tons of these records on which payments had been made were literally piled in forms awaiting further processing [in Bridgeport].

In that respect, the records were not available. I don't know if you call that a confused situation. I guess in some way it could be.

T. 563-564. This was a search conducted not by Kegler or an examiner in Bridgeport, but rather by an assistant in

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<sup>1/</sup> The claim form is signed when the check is picked up by the claimant and stamped by the examiner. Burroughs then went immediately to the bank to cash the check. Therefore, his signature and the People's Savings Bank date stamp would appear on the back of the check. Both these basic records--the check and the claim form--were missing and both should have formed the basis for the compilation of the ledger.



Wethersfield, Alice Romano.

Because of the chaotic and confused state of the records and the crucial nature of the missing documents, the records bore insufficient indicia of reliability to assure an adequate basis for evaluating the truth of the extrajudicial declaration since the truth could not be tested by adversary cross-examination at trial. United States v. Oates, supra at 6459, citing United States v. Puco, 476 F.2d 1099, 1103 and 1105 (2d Cir.) cert. denied 414 U.S. 844 (1973). The initials of the declarant, "D.R.", whose notation of Burroughs receipt of the February 8 check on February 10 rather than February 18, appear on Government Exhibit 22H. "D.R." could have explained the manner by which he or she posted the running ledger account and why the crucial documents were missing. It is entirely possible that "D.R." who posted the ledger was not the same person who gave Burroughs the February 8 check, but would have had knowledge of who did. Since Kegler, the government's witness, had no firsthand knowledge of what had happened in Bridgeport and could only give his opinion that certain documents he could not find were missing and certain documents he could not find were never issued, cross-examination of him shed no light on the reliability of the inference the government was asking the jury to draw from the nonexistence of an entry on February 18, 1975.<sup>2/</sup>

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<sup>2/</sup> Burroughs was eligible to receive a check on February 18, since he was on the extended benefits portion of the compensation program.



Unlike United States v. Puco supra, the admission of the extrajudicial statement in the form of the records was devastating to the defense. "D.R." was not produced by the government, and there was no showing of unavailability. Clearly cross-examination of "D.R." would have revealed the procedure he or she followed in posting the ledger; whether "D.R." recalled Burroughs' visit to the Labor Department Office, whether there was a time lapse between the receipt of the check by Burroughs and the posting of the ledger and most importantly what really happened to the missing check and voucher. Further, the reliability of the entry and ledger could have been weakened under cross-examination. United States v. Oates supra at p. 6460. Indeed the absence of the chemist's signature on defendant's copy of the report and the deletion of a statement regarding chain of custody in Oates, were not more serious omissions or flaws than the missing documents in this case.

Even assuming arguendo that the documents were admissible under Fed. R. Evid. 803(10), the failure of the government to call the proper witness "D.R." or to show his or her unavailability denied the appellant his Sixth Amendment Right to Confrontation. As Judge Waterman stated in Oates;

Whatever the law on this point may once have been, there can no longer be any doubt that, despite the fact that an extrajudicial statement may satisfy the requirements of a recognized exception to the hearsay rule,



the introduction of such a statement may in certain circumstances be barred because that introduction, if accomplished, would violate the defendant's right to confrontation.

Id. at p. 6458 citing United States v. Puco supra at 1102 and 1107 n.1 (opinion on petition for rehearing). Kegler was no better than Glennon, whose unreliability was the basis for this Court's reversal after appellant's second trial. United States v. William Robinson, 544 F.2d 110 (2d Cir. 1976). Further the ledger relied upon by the government at Robinson's third trial, was found insufficient by Judge Meskill writing for the Court after Robinson's second trial to meet threshold evidentiary considerations. Id. at 113-115. Fed. R. Evid. 803(10).

Under Mancusi v. Stubbs supra, Dutton v. Evans, 400 U.S. 74 (1970), and Barber v. Page, 390 U.S. 719 (1968), the government bore the burden of producing the extrajudicial declarant or demonstrating "D.R.'s" genuine unavailability since the extrajudicial statements or entries were crucial to the rebuttal of Burroughs' alibi testimony and devastating to Robinson's defense.



CONCLUSION

The panel's summary affirmance overlooked or fundamentally misapprehended the denial to appellant of his Sixth Amendment Right to Confrontation by admission of incomplete public records and the government's failure to call the examiner who posted the Labor Department's ledger which showed the dates of receipt of payments by appellant's sole alibi witness. For these reasons the panel should rehear the case and reverse the judgment.

Because the case presents a question of exceptional importance arising in the wake of this Court's Oates decision, appellant suggests a rehearing en banc.

Respectfully submitted,

By:



Dated: August 26, 1977

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CERTIFICATION

I hereby certify that two copies of the foregoing Petition for Rehearing and Suggestion for Rehearing En Banc have been mailed to H. James Pickerstein, Esq., Chief Assistant United States Attorney, P.O. Box 1824, New Haven, Connecticut, 06508, this 26th day of August, 1977.

